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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-881

OLLIE HERMAN LINCOLN, JR. *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No.

OLLIE HERMAN LINCOLN, JR. *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Ollie Herman Lincoln, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the jury conviction of petitioner in the United States District Court for the District of Maryland on a one count indictment charging petitioner with violation of United States Code Section 1202(a) Title 18 Appx. and Section 2, Title 18.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered November 5, 1973. The jurisdiction of this Court is invoked pursuant to 28 USC 1254 and pursuant to this Court's general powers of supervision.

QUESTION PRESENTED

Whether proof of an interstate transaction on August 21, 1956 can properly be admitted for purpose of establishing guilt and proof of the nexus to interstate commerce or affecting commerce required under Section 1202(a) Title 18 App. U.S.C., which statute was enacted June 19, 1968 and provides in part, pertinent here;

> "Any person who... has been convicted... of a felony and who receives, possesses or transports in interstate commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000.00 or imprisoned for not more than two years or both..."

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18 App. 1202(a):

"Any person who–

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, *after the date of enactment of this Act,* any firearm shall be fined not

more than $10,000.00 or imprisoned for not more than two years or both."

STATEMENT OF THE CASE

On or about September 21, 1971 at approximately 1:30 o'clock a.m. petitioner was robbed and shot twice in his home. To defend himself petitioner grabbed from a closet a Marlin 30-30 rifle, serial number P22780, and chased the robbers from his home. Montgomery County Police responding to the robbery call saw the petitioner, in front of his home with the said rifle. This rifle according to the evidence admitted during trial, over objection by counsel, was manufactured by the Marlin Firearms Company in Connecticut and was shipped from Connecticut August 21, 1956. (Tr. 44). The trial court, over objection, admitted into evidence Government's Exhibit 4, the Marlin Company shipping invoice and the testimony of one Chester Augustine, an employee of the Marlin Firearms Company, a government witness who testified that said rifle had been manufactured in Connecticut by said company and had been shipped by said company on August 21, 1956 but from the records of said company it could not be determined where it was shipped or to whom but it probably had been shipped out of the State. (Tr. 32-48, 51).

Petitioner's counsel moved to strike the testimony of Chester Augustine and Government's Exhibit 4 on the ground that a 1956 interstate transaction was incompetent to prove a nexus to interstate commerce or affecting commerce under USC Title 18, Sec. 1202(a) App., which motion was denied. Alternatively petitioner's counsel moved that the testimony of Chester Augustine and Government's Exhibit 4 be admitted only for purposes of plan, motive or scheme and not for the purpose of establishing the guilt of the defendant as far as possession of the rifle in violation of USC Title 18, Sec. 1202(a) App. This motion was also denied. (Tr. 170, 173, 174, 180).

The indictment, included in the appendix hereto, charged the petitioner with:

> "Knowingly possessed, received and transported in commerce and affecting commerce three firearms, that is one Marlin 30-30 rifle, serial number P22780, one Smith

and Wesson .38 revolver, serial number R28520 and one Smith and Wesson .32 revolver serial number H29652."

The uncontradicted evidence in the trial court, showed that the revolvers above referred to, during a search pursuant to a warrant were found in the closet of petitioner's wife and said wife testified that she had purchased the revolvers for herself and her use. It is urged that this was a closed fact in the trial court and petitioner was extremely prejudiced by the testimony of Chester Augustine and the admission into evidence of Government's Exhibit 4 aforesaid.

Petitioner's counsel took exception to the following instruction by the trial court to the jury [Tr. 296, 297, 303]:

> "To prove the defendant guilty as charged the Government must prove beyond a reasonable doubt the following three elements:
>
> First, that the defendant, Ollie Herman Lincoln, Jr. was convicted of the felony alleged in the indictment.
>
> Secondly, that the defendant either knowingly possessed or received or transported the firearm as alleged in the indictment.
>
> Third, that if at some time prior to the defendant's receipt and knowing possession of the firearms alleged, the said firearms traveled interstate commerce."

REASONS FOR GRANTING THE WRIT

1. THE LOWER COURT'S CONSTRUCTION AND APPLICATION OF USC SEC. 1202(a) TITLE 18 APP. TO PETITIONER IS CONTRARY TO THE CLEAR WORDING OF THE STATUTE, IS UNCONSTITUTIONALLY VAGUE AND VIOLATES THE CONSTITUTIONAL RIGHTS OF THE PETITIONER SAFEGUARDED BY THE FIFTH AMENDMENT, U.S. CONSTITUTION.

The statute says clearly, "*after the date of enactment*" but the trial judge construes this statute to mean that if at any time prior to receipt or possession the said firearm traveled in interstate commerce. This construction and application allows a

prior innocent act to be the basis for determining guilt. Men of common intelligence necessarily would have to strain their reasoning to reach the understanding of the Court's construction as here applied to petitioner, see *Winters v. New York*, 333 U.S. 507. This Honorable Court has said in *Lanzetta v. New Jersey*, 306 U.S. 451:

> "that no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids: and that a statute is unduly vague when it gives neither the person subject thereto nor the jury which would try him a basis upon which to safely and certainly judge the result."
>
> "Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Lewis v. U.S.*, 401 U.S. 808.

2. THE TRIAL COURT'S CONSTRUCTION AND APPLICATION OF USC TITLE 18, SEC. 1202(a) APP. TO PETITIONER REPRESENTS AN UNPRECEDENTED EXTENSION OF FEDERAL POWER WHICH PORTENDS TO ALTER SENSITIVE FEDERAL-STATE RELATIONSHIPS.

Article 27, Section 445, Annotated Code of Maryland (1957 Ed.) provides:

> "It shall be unlawful for any person who has been convicted of a '*crime of violence*' or who is a 'fugitive from justice' to possess a pistol or revolver."

There is no restriction upon the possession of a rifle by anyone and as to a pistol or revolver the limitations are as above enumerated, none of which classifications include petitioner. As stated by this Court in *U.S. v. Bass*, 404 U.S. 336 at 348:

> "Here we conclude that Congress has not plainly and unmistakably made it a Federal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce."

It is here urged that the evidence of the 1956 interstate transaction involving the rifle is too remote in time to meet the nexus requirement of the statute in question. Further as stated in *U.S. v. Bass, supra* at 349:

> ". . unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance."
>
> ". . .As this Court emphasized only last term in *Lewis v. United States supra,* we will not be quick to assume change in the sensitive relation between Federal and state criminal jurisdiction. In traditionally sensitive areas, such as legislation affecting the Federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision..." "Absent proof of some interstate commerce nexus Sec. 1202(a) dramatically intrudes upon traditionally state criminal jurisdiction."

There is nothing in the wording of the statute in question, nor in its legislative history to suggest that Congress intended any unprecedented extension of Federal power or to alter sensitive Federal-State relationships. However, the construction and application of said statute by the trial judge has this effect. Historically, Congress has been reluctant to enact Federal criminal statutes which seek to regulate conduct traditionally left to the states and in those cases where it has been done, where the Commerce Clause was the constitutional predicate, it was always justified on a showing of a present or future effect on interstate commerce. The trial court has construed the statute in question to say that if "at any prior time", in 1875, 1910 or 1956, a firearm has previously moved in interstate commerce, even if that prior time is long before the "date of enactment" of the statute in question, then possession violates the statute. Congress expressly states "after the date of enactment" and clearly intended to maintain the Federal-State balance. Such has been the construction of all prior Federal

Firearms Statutes. The Supreme Court in its construction of the Federal Firearms Act of 1938, 15 USC 902(f), in *Tot v. U.S.*, 319 U.S. 466, stated:

> "...the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which at some prior time, have been transported interstate."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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Washington, D. C. 20036
Counsel for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1189

United States of America,

Appellee,

v.

Ollie Herman Lincoln, Jr.,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge.

(Argued October 4, 1973 Decided November 5, 1973)

Before Bryan, Senior Circuit Judge, Russell and Widener, Circuit Judges.

Arthur M. Reynolds (Arthur G. Murphy, Sr., on brief) for Appellant; Michael E. Marr, Assistant United States Attorney, (George Beall, United States Attorney, on brief) for Appellee.

PER CURIAM:

Convicted under 18 USC App. 1202(a) of possessing and receiving firearms in interstate commerce after having previously (on October 17, 1968) been convicted of a felony, Oilie Herman Lincoln, Jr. appeals. His only substantial assignments of error are: (1) that, admittedly, one of the three weapons described in the one-count indictment had not been transported in interstate commerce since the enactment of the criminal statute on June 19, 1968; and (2) that the felony of which he had been convicted was wilful tax evasion, 26 USC 7201, not a crime of violence and, therefore, not the type of felony contemplated by the statute.

On consideration of the record and arguments of counsel, orally and on brief, we find the assignment of error without merit and affirm the conviction. *U.S. v. Giannoni*, 472 F.2d 136 (9 Cir.), cert. denied 411 U.S. 935 (1973); see *U.S. v. Mullins*, 476 F.2d 664 (4 Cir. 1973); 18 USC App. 1202(c)(2) defining "felony"; *U.S. v. Mancino*, 474 F.2d 1240 (8 Cir.), cert. denied (June 18, 1973).

AFFIRMED.

INDICTMENT

The Grand Jury for the District of Maryland charges:

That on or about the 12th day of October, 1971, in the State and Judicial District of Maryland,

OLLIE HERMAN LINCOLN, JR.

having been convicted of a felony by the United States District Court for the District of Columbia, that is wilfully attempting to evade and defeat income taxes in violation of Title 26, United States Code, Section 7201, knowingly possessed, received, and transported in commerce and affecting commerce three firearms, that is one Marlin .30-.30 model 336–RC lever action rifle, serial number P 22780, one Smith and Wesson model 32-1 .38 revolver, serial number R 28520, and one Smith and Wesson .32 revolver, serial number H 29652; all in violation of Section 1202(a), Title 18, App. and Section 2, Title 18, United States Code.

George Beall,
United States Attorney

A TRUE BILL:

Foreman

IN THE

Supreme Court of the United States

October Term, 1973

No.

OLLIE HERMAN LINCOLN, JR. *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

CERTIFICATE OF SERVICE OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I hereby certify that a copy of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was served by mail, postage prepaid this 5th day of December 1973, upon Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530 and Michael E. Marr, Assistant U. S. Attorney, U. S. Court House Building, Baltimore, Maryland, attorneys for respondent.

Arthur M. Reynolds
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1000 16th Street, N.W. # 705
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-881

OLLIE HERMAN LINCOLN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that proof that a firearm was transported in interstate commerce prior to the enactment of 18 U.S.C. App. 1202(a) is not sufficient to provide the interstate nexus required by the statute.

After a jury trial in the United States District Court for the District of Maryland, petitioner, a previously convicted felon, was convicted of possessing and receiving firearms, in violation of 18 U.S.C. App. 1202 (a)(1). He was sentenced to two years' imprisonment with 18 months of that sentence suspended, and was fined $3,000. The court of appeals affirmed *per curiam* (Pet. App. 1a - 2a).

The government's evidence at trial showed that petitioner had previously been convicted of a felony in the United States District Court for the District of

Columbia (Tr. 23-24).[1] On September 21, 1971, petitioner was observed with a lever-action rifle and a snub-nosed revolver (Tr. 79-80). On October 12, 1971, one Marlin lever-action rifle and two Smith and Wesson revolvers were seized from a bedroom in petitioner's home in Silver Spring, Maryland, pursuant to a search warrant (Tr. 112-121). Petitioner's fingerprints were on all three weapons (Tr. 149-150).

The Marlin rifle was manufactured in New Haven, Connecticut, and shipped from there on August 21, 1956 (Tr. 37-38). The two Smith and Wesson revolvers were manufactured in Springfield, Massachusetts (Tr. 57). The .32 caliber revolver had been shipped to Laurel, Maryland on May 12, 1971 (Tr. 64-67), and the .38 caliber revolver had been shipped to Roanoke, Virginia on March 20, 1970 (Tr. 69-70).

Petitioner, apparently urging a retrial as to the revolvers only, argues (Pet. 4-5) that the statute should be construed so as to require a showing that the interstate movement occurred subsequent to the date of enactment, June 19, 1968. That argument has been uniformly rejected by the courts of appeals. *United States* v. *Mancino,* 474 F. 2d 1240 (C.A. 8), certiorari denied, 412 U.S. 953; *United States* v. *Giannoni,* 472 F. 2d 136 (C.A. 9), certiorari denied, 411 U.S. 935.[2] It is the receipt or possession of the firearm which must have occurred after the date of enactment, not the interstate

---

[1]"Tr." refers to the two volume transcript of the trial proceedings.

[2]See also *United States* v. *Gazzola,* 475 F. 2d 1393 (C.A. 2), certiorari denied October 9, 1973, No. 72-1587; *United*

movement. Cf. *United States* v. *Bass*, 404 U.S. 336, 350.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

States v. *Mullins*, 476 F. 2d 664 (C.A. 4), certiorari denied, October 9, 1973, No. 72-6700; *United States* v. *Brown*, 472 F.2d 1181 (C.A. 6); *United States* v. *Lupino*, 480 F.2d 720 (C.A. 8), certiorari denied, October 15, 1973, No. 73-5104.

[3]Petitioner also contends (Pet. 5-6) that the statute is unconstitutional in that it makes criminal an act not prohibited by state law. The Commerce Clause imposes no such restriction on the Congress.